RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

JAMES FERRITER ET AL. *v.* J. M. TYLER ET AL.

It is the right of the directors of the public schools to prescribe the hours of attendance of the pupils, and to make a proper system of punishments for absence, &c.

In doing this the public rights and convenience must govern, without regard to the wishes or convenience or private preferences of parents or others.

This rule applies to the attendance of the children on public or private religious worship on week-days during the prescribed hours for school. Such purpose does not excuse violation of the rules of the schools.

IN equity on bill and answer. The complainants were members of the Catholic Church in the village of Brattleborough, and it appeared that on June 4th 1875, the priest of the said church, acting in behalf of the complainants, sent to the respondents, who were the prudential committee of that school district, a request that the Catholic children might be excused from attendance at school on "all holy days," and especially on that day, being holy *Corpus Christi* day. To this note the committee replied that the request could not be granted, as it would involve closing some of the schools and greatly interrupting others.

It further appeared that about sixty Catholic children, by direction and command of their parents, were kept from school to attend religious services on said 4th of June, being, as stated in the bill, "holy *Corpus Christi* day." A few of them applied for admission to the schools in the afternoon of that day, and all, or nearly all, so applied the next morning, when they were told by the committee that, as they had absented themselves without permission, and in violation of the rules of the school, which they well understood, they could not return without an assurance from their parents, or their priest, that in future they would comply with the rules of the schools, the committee assuring said children, and many of their parents, and also the priest, that if said schools would not again be interrupted in like manner they would gladly admit said children to them; that said priest and parents refused to comply with such proposal, and claimed that on all days which they regard as holy they may, as matter of right, take their children from the schools without any regard to the rules thereof.

The bill prayed an injunction against the committee, defendants

from preventing the admission of the complainants' children to the said schools, &c.

The opinion of the court was delivered by

BARRETT, J.—[After stating the facts in detail.] The ground and reason of the *exemption* asked for in this case, as stated in the bill, are, that the parents of said children were members of the Catholic Church, and they were directed by the priest of said church to attend religious services on said 4th day of June and have their children do so, as already more fully stated. The *legal* ground and reason of the relief prayed for are indicated by the expressions in the bill, namely—"their (the orators') constitutional right to worship God according to the dictates of their own consciences, without being abridged in the enjoyment of their civil rights;" and their "right to exercise parental authority and government over their children as regards their moral training and culture;" which, when put in the form of direct and explicit statement, is in effect, that the enforcing of the rules of suspension by the committee upon the children of the orators violated the rights of the orators under Art. III. of the constitution of the state; and violated also the legal right of the orators to control their children in the matter of attending the public schools of the district, as against the right of the committee in the same behalf.

It is the duty of this court to decide whether either of these propositions is maintainable. The article in the constitution on which the former of these depends is, "That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God; and that no man ought to, or of right can, be compelled to attend any religious worship, &c., contrary to the dictates of his conscience; nor can any man be justly deprived or abridged of any civil right as a citizen on account of his religious sentiments or peculiar mode of religious worship; and no authority can or ought to be vested in or assumed by any power whatever, that shall in any case interfere with, or in any manner control, the rights of conscience in the free exercise of religious worship; nevertheless, every sect or denomination of Christians ought to observe the Sabbath, or Lord's day, and keep up some sort of religious worship, which to them shall seem most agreeable to the revealed will of God." In the

light of that article, the former of these propositions, if critically considered in its relation to the case made by the bill, obviously cannot be maintained; for the action of the committee touches not nor affects the worship of Almighty God by the orators, whether such worship be in one way or another, or not at all; nor does it touch or affect their religious sentiments, or peculiar mode of religious worship; nor does it in any manner interfere with or control the rights of conscience in the free exercise of religious worship. That article in the constitution looks only to the personal conscience of the individual as relates to his personal worship of Almighty God. It looks only to the personal relation of the individual to his God, both as to belief and worship; and not to the relation that the individual may sustain to others in respect to their belief and worship. The not consenting that the children of the orators might leave the schools for the purpose of attending divine worship on the day in question did not touch the belief of the orators as to the character of that day, nor did it touch or control the free exercise by them of religious worship according to their belief and conscience, nor is anything to that effect alleged or intimated in the bill.

Still further, it may be remarked that the bill does not present it as a matter of conscience, either with the orators or their children, that the children should attend service on that day; but only represents that it is a holy day in the church, and accustomed to be observed as such. No divine authority for it is quoted or asserted, and its observance, in this instance, by the orators and their children, by attending religious services, is put upon the direction of the priest, without showing or asserting that anything of religious conscience was involved in obeying, or not obeying, that direction. Yielding to supervening authority exercised by a recognised superior is one thing; but it is not necessarily, nor impliedly, the same thing as obedience to the dictates of the inward monitor and avenger.

Again, when the facts set forth in the answer are considered, it seems very apparent that only the attendance of the orators' children on the morning session of the schools on that 4th of June involved any matter of conscience in relation to the day; for many Catholics in the village were about their accustomed business and labor during that day as on other days, "and many of their children were at play in the streets and elsewhere during that day,"

and some of the scholars that had been taken from the schools to attend the religious service presented themselves for attendance in school in the afternoon. Hence, as to the matter of fact as shown by the bill and answer, it would be very difficult to find that the observance of the day is binding on the Catholic conscience; and the bill and answer furnish the only legitimate evidence we have on that subject; and this difficulty is considerably enhanced by the fact, that, up to the 4th of June 1874, that conscience had never caused it to be required that the Catholic children should be absent at all from the schools on that day.

It is proper also to state explicitly that, if the action of the committee, either in the making or the enforcing of the rule, was unlawful in this instance, and was the subject of remedy by suit in chancery, or at law, such suit should not be in the name of the parents, but of the children, as the real party plaintiff.

What is thus presented seems to show sufficient ground and reason for holding that the bill cannot be maintained on the proposition as to the constitutional rights of the orators. But having regard to the character of the subject, and to the scope of the arguments that have been addressed to us, we are disposed to consider that proposition in a broader view.

To this end, suppose the children of the orators to be the orators, and to have set forth as true of themselves all that the bill contains as to the church, and the day, and their priest, and the application to, and refusal by, their teachers and committee, and the attending on the religious services, and the being excluded from the schools, and the action of the committee in respect thereto; and to have been answered in every material respect as the bill of the orators is answered. In such case the ground of complaint and remedy would be, that their (the children's) rights under Art. III. had been violated by the action of the committee. Could it be maintained? This is really the question which counsel for the orators seem to regard as being before the court.

This brings into consideration the scope and purpose of that article of the constitution. It is noticeable as bearing on the subject, that this is the first instance of the assertion of what is now claimed for that article. The article was in the original constitution of 1777, and has been continued from that time to the present. In that original constitution, also, the 40th section was, "A school or schools shall be established in each town by the legislature for the conve-

nient instruction of youth," &c. By the revision of 1785—ratified in 1786—that article was changed in phrase, but not in sense or effect, and thus it has remained, being sec. 41 in our present constitution. The legislature, in pursuance of said provision of the constitution, has been continuously making provision for such schools; and such schools have existed and been in operation in all the towns in the state down to the present time, with great variety of detail as to organization, administration and requirement, even to compulsory attendance by force of specific enactment. While those two articles (III. and 41) have thus, side by side, been in force to every practical intent, all forms of religious belief and unbelief, characterizing the various sects and denominations of men relatively to religion, and all forms of church organization, based on such forms of belief, have been in existence and operation, with all the details of religious worship and service, professedly involving the conscience and its demands peculiar to each differing sect; and yet this is the first instance in which it has been asserted that the administration of our common public schools, under the contemporary constitution in that behalf and the enacted laws, has violated any rights accorded by said Art. III. It is to be noticed still further, that, while those two articles have been in force, and the successive legislatures have been enacting laws under which schools have been going on through the immediate agency and action of committees and teachers, vested with the same official authority as those now in office, councils of censors, charged by the same constitution with the duty of noting infractions of that instrument by the legislature, and vested with the function of initiating alterations of the constitution itself, have been chosen and in official action every seven years, and yet nobody has suggested that the legislation under sec. 41, or the actions of committees and teachers under that legislation, or that sec. 41 itself, has trenched on anybody's rights of conscience under said Art. III. This is stated, not as showing that the action of the committee in this case did not violate such rights, but as showing that the present claim for that article by these orators is of *novel impression*, as we say of a proposition, or question of law, when for the first time presented for judicial consideration.

It now behooves that we should call to mind what, as matter of history, was the occasion, and what the purpose of that Art. III. The history of the Puritans in England, and especially of those

who were known as the New England Pilgrims, shows the occasion; and in this regard it is in point to refer to the religious history of the continent of Europe for several centuries next prior to the formation of our government. The government of England and the governments of the continent had no written organic constitutions defining the powers of the governing authority on the one hand, and defining and guaranteeing the rights and privileges of the subject on the other. The subject lived in subordination to the law-making and law-executing power—he individually, or all the subjects collectively, not being recognised as having rights and privileges, only as they should be accorded to them by those powers. The British idea of the British government was sharply expressed in 1775, in the answer, written by Dr. Johnson, to the resolutions and address of the American Congress—"that the King and Parliament have the power of disposing, *without the consent of the subjects, of their lives, liberties and properties.*" [The italics are in the authentic print.] Sovereignty was not derived from the subjects, but it supervened upon them by "*divine right*," in the form and character of what was called "*the government.*" Church and state were indissolubly connected, the church dogmatizing the faith, and the state enacting it into legal requirement, with disabilities and penalties. The disabilities on the score of religious faith and practice, which subjects were made to experience—the penalties that confronted *non-conformity* in England—the horrors which hunted and avenged imputed *heresy*, at times, both in England and on the continent, had made those who were not of the religious faith required or approved by the governing powers, and who for that reason had gone forth to the desolations of the desert and the wilderness to escape the eye, and ear, and arm of such powers, feel and appreciate the importance, in creating governments for themselves, of seeing to it that such governments should not have the *right*, at least, to subjugate them to like disabilities, penalties and horrors.

In the first constitution of the state of New York, drafted by John Jay, chairman of a committee of his peers in character, and some of them in ability and learning, and adopted on the 20th of April 1777, with but one negative vote in the convention that framed and established it, Art. 38—corresponding to Art. III. in our constitution of the same year—shows in direct expression, the occasion and purpose of the article—an occasion and purpose com-

mon to the colonies then just enfranchised by the Declaration of Independence. I copy thus: "And whereas we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against the spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind: this convention doth further, in the name and by the authority of the good people of this state, ORDAIN, DETERMINE and DECLARE, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall for ever hereafter be allowed within this state to all mankind: Provided, that the liberty of conscience hereby granted shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of this state."

When our constitution was first framed and adopted, no occasion had been given for regarding the grievance that is now complained of; so, such grievance could not have been in mind as an object specially to be provided against in the making of that Art. III. On the other hand, the government-making people of New England, in the causes that had led to its first settlement by the Pilgrims, and by their children, and by after emigrants and *their* children, had ever deep and fresh in mind occasion and reason for the provisions of that article. And nothing could more fully, pointedly and specifically indicate the nature of such occasion and reason than the language of the article itself. It was designed by it to secure to every subject equal civil rights, irrespective of his religious faith; so that his being a Catholic or a Protestant—his being a Calvinist, or an Arminian—his being an orthodox evangelical, or a free-thinker—his being a Baptist, or a Universalist—an Episcopalian, or a Quaker, should not make him the object of discriminating legislation or judicial judgment to his disadvantage, as compared with those of different faith and practice, so that no law should be aimed or executed against him because he professed and practised one form of religious belief, or disbelief, rather than another, within the limits of personal immunity consistent with good order and the peace of society under the government. It was designed to debar the law-making and law-administering powers from enacting, or adjudging, that, unless the subject should profess a prescribed system of faith, and become a member of a prescribed religious organization, and conform in his worship to the prescribed ritual,

he should not be entitled to the same personal rights, privileges and enjoyments under the government as those who should do so. It was designed to secure absolute equality before the law of all subjects under the law, whatever might be their faith, or notions in the matter of religion. And as a result, may not a Catholic be a Catholic, as freely as a Protestant may be a Protestant, with no law aimed at him because he is a Catholic and not a Protestant? It would seem to be trifling with a momentous subject, to claim that Art. III. was designed to prohibit the legislature from enacting any law, the carrying into effect of which might interfere with the wishes, and tastes, and feelings of any of the citizens in the matter of religion, and even with the performance of religious rites that should be regarded as matter of conscientious duty on the part of some of the subjects of the realm. Government, with reference to the ends designed to be secured and served by its existence and action, is altogether a practical matter—not speculative, fanciful, sentimental, or impracticable. It performs its functions, and works out its results, by the instrumentality of laws enacted and laws administered—laws adapted to the subject-matter of them, and to the accomplishing of the ends designed, and operating equally and alike upon all who come within their scope.

One of the chief ends of the government is to provide means and facilities for developing, and educating, and training the young into virtuous and intelligent men and women. This is recognised and emphasized by the section of the constitution already referred to as to schools; and which since 1786 has been in these words: "Laws for the encouragement of virtue and prevention of vice and immorality ought to be constantly kept in force and duly executed, and a competent number of schools ought to be maintained in each town for the convenient instruction of youth."

As already suggested, the constitution proceeds upon the assumption that this can be done consistently with Art. III. In pursuance of that assumption, the legislature, through the whole course of our existence as a state, has been active and earnest, and considerate, in the making of laws for the existence and support and management of what is meant by "schools in each town." In so doing it has never aimed to make, nor has it ever made, any provision that discriminates or distinguishes in its operation, between persons of different religious sects. All are subjected alike to the law and its administration. The Methodist who regards

his camp-meeting as demanding as much of his conscience, as the Episcopalian does his Christmas or Lent; the Episcopalian, who regards the feast and fast days of his church, as demanding as much of his conscience, as the Catholic does his holy "Corpus Christi:" the Congregationalist and Presbyterian, and Baptist, and other sects, who care for none of these things, and whose prayer meetings and protracted meetings demand as much of their consciences, as in the case of the others before named, and the man of no preference and no religion, *all*, and all their children, are subjected alike to the school laws, and to their administration.

Art. III. was not designed to subjugate the residue of the constitution, and the important institutions and appliances of the government provided by the enacted laws for serving the highest interests of the public as involved in personal condition and social relations, to the peculiar faith, personal judgment, individual will or wish of any one in respect to religion, however his conscience might demand, or protest. In that respect it is implied, that while the individual may hold the utmost of his religious faith, and all his ideas, notions, and preferences as to religious worship and practice, he holds them in reasonable subserviency to the equal rights of others, and to the paramount interests of the public as depending on, and to be served by, general laws and uniform administration. Rights of conscience and schools, under the constitution, were, when that instrument was made, and have been, during all its continuance, to be harmonized with practicable consistency—the schools under section 41 not to be subordinated to the rights of conscience under Art. III. any more than the rights of conscience under Art. III, are to be subjected to the rights as to schools under section 41.

And, as bearing pointedly on this view, it is of interest to notice the change that was made in the constitution of 1777 by the revision of 1786. Sect. 40 of the former began, as already quoted: "A school or schools shall be established in each town by the legislature for the convenient instruction of youth," and continuing "with such salaries to the masters, paid by each town; making proper use of the school lands in each town, thereby to enable them to instruct youth at low prices. One grammar school in each county, and one university in this state ought to be established by the General Assembly." Sect. 41 of that constitution of 1777 was: "Laws for the encouragement of virtue and prevention of

vice and immorality shall be made and constantly kept in force; and provision shall be made for their due execution; and all religious societies and bodies of men that have or may hereafter be united and incorporated for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they in justice ought to enjoy, under such regulations, as the General Assembly of this state shall direct." It is thus seen, that, in the original constitution, "the encouragement of virtue and prevention of vice and immorality" were associated in the same section with the provision for the protection and encouragement of "religious societies, and bodies of men, united and incorporated for the advancement of *religion* and *learning*." That section did not embrace or contemplate "the schools in each town"—they, together with "one grammar-school in each county, and one university in this state," constituting the separate subject of the preceding section.

By the revision of 1786, that section 40 was incorporated into said section 41, immediately after the first clause, as is shown by section 41 of our present constitution, already recited. From all which it is plain that, in those early times, *religion* and *learning*, under the constitution and the laws to be enacted, were deemed to be compatible, and that schools of all grades, from the "schools in each town" to the university, were to be the subjects of legislation under the constitution; and it is especially plain that the "schools in each town," as early as 1786, were combined with, if not given the precedence to, *religious* societies and bodies of men, as an instrumentality of the government, by means of laws, "for the encouragement of virtue, and prevention of vice and immorality." In conclusion on this topic, as we cannot improve, so we adopt the language of Judge POLAND, in *Williams* v. *School District in Newfane*, 33 Verm. 275: "Without making further reference to the almost numberless acts of the legislature, exhibiting the most active watchfulness and fostering care for the cause of popular education, enough has already been stated to show that the whole subject of the maintenance and support of our common schools has ever been regarded in this state, as one not only of public usefulness, but of public necessity, and one which the state in its sovereign character was bound to sustain."

We now proceed to remark, that it stands out so plain as not to

be matter for debate, even if it be not expressly conceded, that schools, in order to realize the intent of the constitution in their behalf, must be subjected to system and order under established rules. Hence, the law charges the committee with the duty of "adopting all requisite measures for the inspection, examination and regulation of the schools, and the improvement of the scholars in learning:" Gen. Stat., ch. 22, sect. 39.

Let it be granted that parents and others may, upon their own respective reasons, control the attendance of the scholars, as against the official right of the committee in that behalf, and practically, the ground of system, and order, and improvement, has no existence. For the parents and guardians of the scholars may, each on his own motion, and on his own notions, withhold their respective scholars from the schools. In this respect, so far as its effect on the schools is concerned, it makes no difference whether the occasion and motive involve conscience, will, whim or the pocket.

Now, when this matter of conscience, as against the requirements of the law, is brought to the test, the practical result of what is claimed by the orators in this case is shown to be so impracticable, not otherwise to characterize it, as to preclude further discussion. If a Catholic citizen should be serving on a jury in the midst of a trial, when divine service in his church on holy "Corpus Christi" should be in progress, would it be a violation of his rights under said Art. III. to compel him to keep his seat and serve through the trial? The same may be asked of the Jew or the Seventh-day Baptist, who should be required to do like service on Saturday. The same may be asked of a devout Methodist, when a camp-meeting or a love-feast should be in progress in his vicinage. If either or all should refuse to serve, would their rights of conscience under Art. III. be a valid defence in a prosecution for the penalty in such case provided? Suppose a Catholic sheriff should have in his hands some process which it became his *official* duty to serve during the time that divine service in his church on some holy day should be in progress, would his rights of conscience under Art. III. be a good plea in bar to an action for official default by reason of attending said service "for conscience sake," instead of making service of the process? But enough of test and illustration.

Let it be repeated then that, that article in the constitution

was not designed to exempt any person, or persons of any sect, on the score of conscience as to matters of religion, from the operation and obligatory force of the general laws of the state, authorized by other portions of the same instrument, and designed to serve the purposes contemplated by such other portions; it was not designed to exempt any persons from the same subjection that others are under to the laws and their administration on the score that such subjection at times would interfere with the performance of religious rites, and the observance of religious ordinances, which they would deem it their duty to perform and observe but for such subjection. While all stand on equal footing under the laws, both as to benefits and privileges proffered, and as to exactions made, and liabilities and penalties imposed, no one's rights of conscience, as contemplated by said Art. III., are violated in a *legal* sense.

And it is fitting here to remark, that this court have to deal with the subject as *jurists*, regarding the constitution, and the laws, and what is done under them, with reference to principles and reasons that appertain to the subject in its legal elements, qualities and aspects, and not as religionists, not as sectaries, not as those who regard something besides the government as of ultimate supremacy in the affairs of men on earth, but as those who regard the government created by the constitution, and the laws made under the authority, and within the scope of the constitution, as the ultimate sovereignty in this state, and as equally obligatory and effectual upon all. It is not our *official* duty to discuss, nor our official prerogative to pronounce upon the policy or propriety of the provisions and requirements of the constitution, or of the laws enacted conformably to the constitution, in view of their bearing upon the matter of personal religion and morals, or on the matter of religious, moral and secular education; but it is only our province to interpret and give application and effect to the constitution and laws as they exist. The court does not make the law, either constitutional or statutory, but only administers it in cases as they are presented for consideration and decision. The part of the opinion in *Donahue* v. *Richards*, 38 Maine 379, and the cases cited, which bear on this ground of the present case, are worthy of attention by all who may be interested in the subject.

Pursuing no further the discussion of this ground and aspect of the case, it is proper here to remark, that the note of the priest to the committee did not state any ground for asking for the exemp-

tion from attending school on the particular day in question, nor was the application limited to that day, nor did it name that day at all; but it was an application for a dispensation, as matter of *favor* on the part of the committee, from attendance "on all holy days," with nothing indicating a *claim of right* made upon the committee; and so, no cause, reasonable or otherwise, was presented, in view of which the committee could be put in a position of official fault by not giving leave of absence on that day.

Then, as to the *condition*, on which only they would let the absenting scholars return to their schools—in that they asserted their right to enforce the rule of exclusion for the residue of the term. So far as rights of conscience under the constitution are involved, they were not precluded of that right—that is, the Art. III. does not render invalid the law under which the committee claim authority to make and enforce that rule, nor the rule itself, as we have already shown.

It remains now to be considered whether the bill can be maintained on the other ground, namely: the prerogative of parents to control their children as scholars, as against the prerogative of the committee to make and enforce the rule in question. This does not involve any right or question of conscience under the constitution, but only the matter of *legal* right under the statutes as to public schools. In this case it is not a question of discipline or punishment of the scholar, as it was in *Lander* v. *Seaver*, 32 Verm. 144, or as it was involved in the case of *Morrow* v. *Wood*, (Iowa) Law Reg. November 1874, p. 692. By our statutes the committee are charged with the duty of "adopting all requisite measures," &c., as before recited. The graded school in Brattleboro' is organized and acts in pursuance of the statutes in that behalf. The committee are chosen and charged with their duties under the same statutes. They adopted rules for the regulation of the schools, and for the improvement of the scholars in learning. The rule in question is for the purpose of inducing and enforcing constancy in attendance. That such constancy is essential to such improvement is not debatable. That such attendance is requisite, as matter of regulation, in order to the necessary classification of the scholars in reference to age, capacity, studies and proficiency, is not debatable. Those who attend constantly cannot be required to linger, in order that the inconstant may keep along with them; nor can such inconstant scholars keep equal pace with

those who attend constantly. The rule, then, is such as is contemplated by the statute, so far as the *purpose* of it is concerned. That purpose is indispensable to the attainment of the object and end proposed by the statutes, both as to the individual scholar, and as to all others who may be affected by his attendance and absence. The answer states, as before recited, that the rule had been in operation for more than ten years. The children of the orators were subjected to its operation in the present instance. Was that unlawful?

If the orators had the right to control the attendance of their children as against that rule, then the committee had not the right to maintain and enforce such rule. We are not prepared to sanction a view of the subject that would subordinate the authority of the committee, in the matter of the attendance of registered scholars, to the will of parents. On the other hand, we do not hesitate to hold and declare as matter of law, that, in this respect, the citizen is in subordination to the lawful rules for the regulation of schools and the improvement of scholars in learning; and this is for the same fundamental reason that he is in subordination to the statutes themselves, on that, or any other subject; and it is no more his right to defy or disregard those rules, than it is to defy and disregard any statute that affects him as a citizen in respect to schools, or any other subject involving the common weal, as it is to be provided for under the constitution by the legislation of the state. The occasion does not require a repetition of the trite maxims as to the surrender of natural rights as a condition of citizenship under the government, and is answered by the remark, that if the citizen, either on the score of conscience, or of parental prerogative, or in any other respect, finds himself unduly curbed and restricted in what he regards his personal rights, natural or otherwise, by the constitution and the constitutional laws of the state, there is available to him the beneficent declaration of Art. XIX.

It suffices to recur to some of the leading cases that have been before the courts, some of them involving the prerogative of teachers and committees immediately over scholars, where parents have not interposed; some of them involving that prerogative in respect to scholars where, as in this case, parents have interposed. Of the former kind is *Guernsey* v. *Pitkin*, 32 Verm. 224, where, by the concurrence of committee and teacher, the plaintiff was virtually

excluded from the school, because he would not comply with the requirement upon all scholars in grammar, to write compositions. In that case there was no prescribed penalty constituting a part of the rule of requirement, but the penalty was extemporized to meet the exigency. The prerogative of the committee and teacher, both as to requirement and penalty, was maintained. In *Landers* v. *Seaver*, 32 Verm. 114, the plaintiff, a boy some eleven years old, some hour and a half after the school had closed for the day, and when he was at his home, and engaged in his father's service, used saucy and disrespectful language to the teacher, the defendant, in the presence of some of his fellow pupils. For this the defendant whipped him on his going to school the next morning. The court held the following language: "But where the offence has a direct tendency to injure the school and bring the master's authority into contempt, as in this case, when done in the presence of other scholars and of the master, and with the design to insult him, we think he has a right to punish the scholar if he comes again to school." Such was the judgment of the court in full bench, upon full argument and careful consideration, and no doubt is now entertained by this court of its soundness and propriety.

In that case there was no *prescribed* rule, either as to conduct or penalty. But it involved directly the prerogative of the teacher, as against the *exclusive* authority of the parent over his child, in reference to that child's conduct as affecting the school of which he was a scholar.

In *Sherman* v. *Charlestown*, 8 Cushing 160, the plaintiff was expelled from school on account of licentious and immoral character, though not manifested by any acts within the school. The action was founded on a statute of Massachusetts, entitling a party to recover damage for being unlawfully excluded from public school instruction. In that case there was no *prescribed rule* on the subject, either of requirement or penalty. Ch. J. SHAW, in the course of an opinion which would be instructive and salutary to all to read and ponder, says: "It seems to be admitted, if not it could hardly be questioned, that for misconduct in school, for disobedience to its reasonable regulations, a pupil may be excluded. Why so? There is no express provision in the law (as it then was) authorizing such exclusion; it results by necessary implication from the provisions of law requiring good discipline. It proves that *the right to attend is not absolute, but one to be en-*

joyed by all on reasonable conditions." Again, "but the court are of opinion * * * that a power is vested in the general school committee, or the master with their approbation and direction, to exclude a pupil * * * for good and sufficient cause:" *Stephenson* v. *Hall et al.*, 14 Barb. 222, was an action against the defendants for expelling, as trustees, the daughter of the plaintiff from a public school. She had been excluded by the teacher, for alleged misconduct, with the concurrence of the defendants. On appeal to the superintendent, she was to be permitted to return to the school on certain conditions of promise as to future conduct, with a confession that she had done wrong. She refused to comply with the conditions. ALLEN, J., in the course of the opinion, says: "it is undoubtedly true that trustees have the power, and it is their duty, to dismiss, or exclude a pupil from their school, when, in their judgment, it is necessary for the good order and proper government of the school so to do."

We have carefully studied the Iowa case of *Morrow* v. *Wood*, before cited, and not only find nothing in conflict with the other cases decided, but that the ideas expressed by Judge COLE are in harmony with the other cases. In that case the teacher required a boy to study geography. His father, for good reasons, wanted him to devote himself to other studies, requiring all his time and strength, without geography. The boy, in obedience to his father's direction, refused to study geography, and the teacher whipped him. Hence the suit. It appears that geography was one of the studies required by law to be taught; but there was no law requiring any scholar, or particular description of scholars, to study it. There was no rule of the school, besides the arbitrary requirement of the teacher, which would make it the duty of the boy to pursue that study.

Judge COLE says: "The statute gives the school board power to make all needful rules and regulations for the organization, gradation and government of the school, and power to suspend any pupil from the privileges of the school for non-compliance with the rules established by them, or by the teacher with their consent." It does not appear, nor is it inferable, that the school board had made a rule requiring the boy to study geography, or had given their consent to the requirement of the teacher.

The question then was, whether the teacher had justifiable cause for whipping the boy. The court held, that she had not, and in the

discussion, held that, on the facts in the case, the father had the right to direct as to the study of geography by his son. We see no occasion for differing with the court in that case. In the course of the opinion it is said, "it is not proposed to throw any obstacle in the way of the performance of their duties" by the school board. Again, "we do not propose to lay down any rule which will interfere with any reasonable regulation adopted for the management and government of the public schools, or which will operate against their efficiency and usefulness. Certain studies are required to be taught in the public schools by statute. The rights of one pupil must be so exercised undoubtedly as not to prejudice the equal rights of others. But the parent has the right to make a reasonable selection from the prescribed studies for his child to pursue, and this cannot possibly conflict with the equal rights of other pupils. In the present case the parent did not insist that his child should take any study outside of the prescribed course." "And how it can result disastrously to the proper discipline, efficiency and well-being of the common schools to concede the paramount right to make a reasonable choice from the studies in the prescribed course which his child shall pursue, is a proposition we cannot understand." And this, as well as all that was said by the judge, is to be taken as said in a case where there was no rule as to the study of geography by the boy, except the personal arbitrary command upon him of the teacher. How this court would decide in a case involving the question of superiority of authority between the parent and the school board, as to the pursuit of a study required by the established rule of the board, we have now no occasion to announce or intimate. Nor had that court any such question before it.

In this connection it is interesting to refer to the case of *Spiller* v. *Woburn*, 12 Allen 127, in which a girl, by direction of her father, refused to bow her head during prayer at the opening of the school, and where the father refused to request that she might not be required to, the rule on that subject providing that scholars would not be required to, whose parents should request that they might not be so required. Ch. J. BIGELOW delivered the opinion of the court, which held that it was lawful for the committee to expel her from the school for such disobedience to the rule. And further in the same connection, the case of *Spear* v. *Cummings*, 23 Pick. 224, is worthy of attention, in which Ch. J. SHAW says,

"The law provides that every town shall choose a school committee, who shall have the general charge and superintendence of all the public schools in such towns;" that "this includes the power of determining what pupils shall be received and what pupils rejected. The committee may, for good cause, determine that some shall not be received, as, for instance, if infected with any contagious disease, or if the pupil or parents shall refuse to comply with regulations necessary to the discipline and good management of the school."

These cases show the judicial views that have been held on the subject under consideration, and suffice for the present.

Recurring now to what is stated in the answer, as to the manner in which the rule has been administered, it is proper to remark, that the lawfulness and propriety of the rule are not to be tested or adjudged, upon the presumption that the penal part of it will be unjustly or unwarrantably enforced. The presumption is the other way, viz.: that it will be administered justly, and upon, and with reference to, warrantable occasion. If a case should arise in which it should appear that the penalty had been inflicted outside of, or beyond the fair scope and reason of the rule, it would be both the province and the duty of the courts to accord proper remedy. But, as before demonstrated, this is not such a case; and this leads to the further remark, that the remedy is not sought in this case as against the refusal of leave to be absent on the 4th of June; but as against the imposing, as the condition of remitting the penalty, a promise that absence for a similar cause should not be repeated that term. Such promise being refused, the penalty of exclusion was not remitted, and the children did not return to the schools. And hence the position assumed by the orators—the same as already stated—that the committee had not the lawful right to exclude scholars who should be absent by the direction of their parents, contrary to the established rule of the school.

As before intimated, this position takes no account of any difference of occasion or reason for such direction of parents, whether it be religious service, or secular employment, or amusement, but is on the ground only of the right of the parent as against the rule of the school. In reference to that position, in explicit statement, as the result of the discussion, it is held, that scholars of a school are amenable to the school authorities as to their conduct as scholars affecting the school, notwithstanding the prerogative of their parents in respect to them.

This, however, does not imply that committees or teachers are the ultimate judges whether their measures, either by prescribed rule, or extemporized, expedient or impulsive act, are *lawfully* requisite or proper in a given case. The statute, in imposing the duty of adopting all requisite measures, &c., does not confer ultimate jurisdiction on committees of the question whether a particular measure is requisite or not, within the sense and intent of the statute. When such question of *lawfulness* under the statute is made between a party, against whom the measure operates, and the committee or teacher, that question is *open* before the courts for consideration and decision, in view of all that appertains to the subject of it. The rule in question in this case, and the enforcement of it, are subject to the judgment of the courts as between the parties to the suit. It is easy to suppose cases in which such enforcement would be beyond the lawful right of the committee. The rule itself, in terms and intent, contemplates exclusion as a penalty only where permission to be absent is withheld for want of reasonable cause shown. In case of casual sickness of the scholar —of sickness or death in the family of the scholar—of some impediment, like fire or flood—in case of various incidents of current life, giving occasion for temporary absence, the enforcement of the penalty of exclusion would, under circumstances, be adjudged to be unauthorized under the statutes and law by which the subject is governed.

It is not intended by this to be held that there may not be cases in which the decision and action of the committee or teacher would not be deemed *judicial* and final. That subject has been involved in many of the decided cases, under peculiar statutes, especially in Maine and Massachusetts. We have no occasion to pronounce upon it further in this case.

Upon the facts shown, we are unable to find any warrant of law for maintaining the bill.

The decree dismissing it is affirmed.

The following seem to be the leading facts upon which the case rests :—

1. There is a distinct refusal of the teachers to allow the Catholic children to absent themselves from the school, in order to attend the service of their church on holy days, and a persistent claim to demand the contrary, upon penalty of continued exclusion from school.

2. This is confirmed by the committee, and what is said about the short or imperfect notice is clearly waived by persisting in the claim.

3. There can be no doubt the 4th of June was a high festival in the Roman

church, and that the teachers knew the day before that this church so regarded it, and desired their children to attend the services.

4. There can be no question both the parents and the priest desired, and required, the children to attend service in church on that day, and that this was sufficiently made known both to the teachers and the committee.

5. There can be no question also that, with all this knowledge, both teachers and committee concurred in refusing permission.

6. It seems equally clear that they also concurred in refusing such children as attended the service, permission to return to the school, except upon their assurance that it would not be repeated, thus clearly treating them as being in the wrong for attending such service, and that they might rightfully be punished for the same.

These facts being established, two questions seem fairly involved in the case. (1.) Whether in case of conflict the conductors of the school may lawfully insist upon their rules and regulations, setting aside those of the church where the children receive religious education; in other words, how far school education may interfere with or supersede religious education? (2.) How far the school laws or regulations will control the right of the parents to direct the attendance of their children upon religious services, and expose the children to punishment for obeying their parents in this respect?

The answer to these questions will depend upon the laws of the state. The provision of the Constitution will, of course, override all legislation upon the subject in conflict with such provision. The clause bearing directly upon this point, as stated in the opinion, is: "*That no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience in the free exercise of religious worship.*" We have emphasized these words because they seem to us peculiarly expressive of a settled determination in those who ordained them, as the perpetual basis of religious freedom in the state, to leave no ground for misunderstanding or evasion. If these words do not place the rights of conscience in regard to freedom of religious worship, above legislative control, then it seems to us difficult, if not impossible, to conceive of any which would have that effect. And the history of these provisions in the other American state constitutions, and the motives which induced them, as fully set forth in the opinion, would not allow us to suppose the framers of these constitutional provisions meant anything less than their words import.

And when we come to look into the laws of this state in regard to schools, we find no provisions calculated to justify the exercise of any such interference with religious worship as was here attempted. Every town is required to maintain "one or more schools for the instruction of the young, in orthography, reading, writing, English grammar, geography, arithmetic, history, and Constitution of the United States, and good behavior." We should be somewhat at a loss to conjecture upon what ground any governor of the schools, under these provisions, could assert any such stringent discipline as was attempted in this case. It is pretty certain that compelling the children to disobey their parents, or punishing them for refusing to do so, would not, ordinarily, be regarded as the natural mode of teaching "good behavior" to them, or it surely would not have been so regarded when that provision in the statute was first incorporated into the school laws of the state And we cannot suppose any one would believe any such stringency of discipline indispensable for the suc-

cessful teaching of any or all the branches of study required by the statute. But if we may suppose that to have been the fact in this case, it will not conclude the rights of those who compose the school, since no school regulations can possess authority superior to the statute, and no statute of that character could override an express constitutional provision to the contrary. We must conclude, therefore, that the defendants were not justified in what they did, because the Constitution of the state guarantees entire immunity from all interference with religious worship to all its inhabitants.

It scarcely seems necessary to allude to the suggestion, whether there can be any question of conscience involved in celebrating "Corpus Christi" in the Roman church. It is confessedly one of its high festivals, and has been so for hundreds of years. But there seems to have been some idea thrown out, that it might be celebrated at an hour not interfering with the schools. But this suggestion probably proceeds from want of knowledge of the requirements of that church. Such a festival can only be properly celebrated by high mass, where the church have the musical appliances for such masses, and this must be celebrated before 12 o'clock, noon, and must therefore begin as early as 9 o'clock, A. M.; and all will feel the absurdity of requiring it to begin at 6 A. M., in order to finish before school hours This is, in fact, never done in that church, if it be allowable even, which we question. At all events, if the rights of worship are made by the organic law of the state, superior to legislative control even, it would seem little less than absurd to have rules of school attendance attempt to overrule the canons of the church, which have been observed for hundreds of years. Any such untimely celebration of the day would not be, to the devout worshipper, a celebration at all. And who would wish to train up his children in so irregular a manner? We think this matter is not fully comprehended by most of the Protestants. They have no daily service and no great festivals. Their week-day meetings are held mostly in the evenings, and it does not occur to them why the Catholic church may not do the same. But that church is bound to have daily morning service throughout the year, and on festivals, high mass, and all before 12 o'clock noon. So that it will require them to begin at midnight, as it were, certainly at a very inconvenient hour, at some seasons of the year in this high latitude, in order to finish before school hours. And then, the children would be in no condition to perform their school duties after so protracted a service in church. It is evident that those who argue for such an accommodation must do it under some misapprehension of the facts. And what is said about these parents or priests, not considering the day too holy for their children to play in the streets in the afternoon, must equally proceed from similar misapprehension. That church never considers it any departure from the strictest observance of its festivals to recreate in the afternoon.

Even their fasts are not observed so much by long-facedness as by *bonâ fide* abstinence and self-denial. No branch of the Catholic church ever regarded Sunday any more sacred than its other festivals, but less so than many others; that is wholly a Protestant idea and mainly Puritan.

Possibly Protestants would comprehend this question more fully, if we supposed the laws of the state to require the scholars in the common schools to attend some moral or philosophic lecture, in some grand hall, on Sunday morning from 9 o'clock to 12 o'clock. And there is nothing to hinder the legislature doing this, except this same Art. III., guarantying freedom of religious worship, which does indeed also

declare that every denomination of Christians ought to keep up "some sort of religious worship" on the Lord's day. But every other legal provision for rendering that day more sacred than any day, consists in mere statutory provisions, which may be repealed any day, and then nothing would be less improbable than to require all the common school children to hold a kind of musical or other artistic service, devoted to the gods of the day, as has been done before in other states or countries; and how could any one say, such a service would not be "some kind of religious worship" within the Constitution? We do not doubt some of the descendants of the Puritans would be able to comprehend that this would be an essential abridgment "*of the rights of conscience in the free exercise of religious worship.*" They would feel it more because it interfered with their worship on Sunday. But there can be no question, the Roman church, or the English church and its American branch, conscientiously regard some of its festivals, falling on week-days, far more sacred than an ordinary Sunday, and so equally of the services. We need not specify beyond Christmas and Holy Thursday or Ascension day, as to the English church. And from what we have seen of the mode of celebrating "Corpus Christi," on the continent of Europe, we make no question that is one of their greatest days. The same may be said of the Feast of the Purification, or Candlemas, which is celebrated in St. Peter's, Rome, in a style of magnificent display infinitely beyond that of an ordinary Sunday. It is only Easter day that is properly called the Lord's day in the Catholic church as the anniversary of the resurrection. The other Sundays in the year are called so by courtesy. The undeniable fact that we Protestants have become a kind of Sunday Christians, renders it difficult for us to comprehend what burdens we are really laying upon churchmen, when we require their children to absent themselves from church and actually attend school upon the most sacred fasts and festivals of their church. We believe nothing more is required to induce justice in regard to these matters, than a fuller comprehension of the real facts in these cases. It is only very recently that the courts and the schools have discontinued their sessions on Christmas and Good Friday. And even now some of the courts require to be informed, that in holding sessions on Good Friday they are but giving countenance to the precedent of Pontius Pilate.

There can be no doubt in this case the children were required to disobey their parents, and were punished for not doing so. They might as well have been subjected to corporal punishment as to exclusion from school. Then the case would have been precisely parallel with that of *Morrow* v. *Wood*, 13 Am. Law Reg. N. S. 692, and the able and judicious opinion of Mr. Justice COLE would fully apply to this case. Since the common schools have been compelled, by the contrariety of opinion upon religious subjects in the country, to virtually abandon all instruction upon the subject, it must not be expected that it can be also tolerated in a Christian country, that they should be allowed to teach positive irreligion, or what directly conflicts with Christian teaching upon morals. The first great command of the Decalogue, as to our duty to each other, is, "Honor thy father and thy mother." There could then be nothing more in conflict with Christian teaching than to require the children to disobey their parents. It is creditable, we think, to the Roman church that their children were too well taught in their primary duty to their parents to obey the school, when it came to a conflict between the school and their parents.

It is greatly to be feared that we are

all quite too indifferent to the general effect of so magnifying the authority and wisdom of the common schools in the eyes of the children, above their parents, in all matters even remotely pertaining to education, and at the same time teaching the children that mere text-book knowledge is superior to all other attainments. There can be little doubt, this may have contributed more than we comprehend to that general disregard and disrespect among the young toward their elders, which is so much deplored by many. But when it comes to the matter of religious teaching, which is so exclusively under the control of the parents, and by the very organic law of the state made sacred above all other rights, it might be supposed no one could fail to comprehend the unreasonableness of the claim here made. What is said in the Constitution of the state about the duty of maintaining schools, and the consequent necessity of their claims being vindicated by the courts, is all very well. But it must be remembered that the provisions in the Constitution about schools are subordinate to those securing freedom of religious worship. And if we make the case under consideration our own, we shall all be able to comprehend that the demands of the school authority here were most unreasonable and without either law or necessity. We think it unfortunate, both for the interests of the schools and the quiet and good order of the country, that any class of Christians should have been subjected to such hard measures in defining religious freedom, the thing above all others of which we boast the loudest. It seems to us far wiser to mete out to all the most liberal measures upon this subject, especially where, as in the present case, it must be conceded by all that they offer a very plausible, if not, as we think, an invincible legal vindication of their claim. By so doing we shall be able to secure the support of the clearest popular conviction in support of the decisions of the courts, in refusing all countenance towards clearly unreasonable and illegal demands of that character.

I. F. R.

Supreme Court of New Brunswick.

EUROPEAN AND NORTH AMERICAN RAILWAY COMPANY *v.* GEORGE McLEOD.

The plaintiff company was about being organized, and defendant was asked to take stock in it, and subscribed his name to a paper prepared for that purpose, agreeing to take ten shares. *Held*, that this was an offer made by the company on the one side, and accepted by the defendant on the other, and that a complete contract was formed, which made him liable as a stockholder to assessments.

Held, also, that it was not necessary that certain shares designated by numbers should be assigned to defendant, to make him liable.

THIS was an action of debt to recover a balance alleged to be due from the defendant as a subscriber for stock in the European and North American Railway Company.

It appeared at the trial that a meeting to organize the plaintiff company under the Act of Incorporation was held on the 30th May 1864, when directors were chosen, a secretary and treasurer